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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-306

No. ~~1851~~

HUMBERTO TOBAR, JUAN RAUL LOPEZ,
and VINCENTE COLON,
Petitioners,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Comes now Jerome Lewis, attorney for petitioner Lopez, and Joseph A. Solovei, attorney for petitioners Tobar and Colon, and hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, entered May 26, 1971.

Opinions Below

The opinion of the Court of Appeals is set forth in the Appendix A pages 13 to 17, but is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 26, 1971 (App. B, p. 18 *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether it is a deprivation of a fair trial and due process in a criminal cocaine case to permit the use of untested but judicially noticed statistical "evidence" to support inferences from possession of the origin of the cocaine and of guilty knowledge of illegal importation.

2. Whether a defendant is denied his right to confrontation of witnesses under the Sixth Amendment by the use of judicially noticed statistics dealing with the manufacture, distribution and theft of cocaine.

Statement

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of receiving, concealing and facilitating the transportation of cocaine knowing the same to have been illegally imported in violation of 21 U.S.C. §§ 173, 174 (Count Two). Petitioners were acquitted of knowingly importing the cocaine (Count One).

Petitioner Humberto Tobar was sentenced to 7½ years imprisonment. Petitioner Juan Raul Lopez was sentenced to 10 years imprisonment. Petitioner Vincent Colon was sentenced to 7½ years imprisonment.

The evidence, which is set forth in some detail in the opinion of the court below (App. A. pp. 14-15, *infra*), consisted almost entirely of testimony of federal narcotic and custom agents who kept petitioners under visual surveillance (T.T. 228-269, 275-328, 379-458).*

* Reference key: T.T. refers to pages of transcript of trial proceedings.

Pursuant to an informer's tip, two narcotic agents and a custom agent maintained a surveillance on the Colombian ship, *Buenaventura,* which was docked at a Brooklyn pier during the early morning hours of May 27, 1970. This ship had stopped at two American ports before its arrival at the Brooklyn pier (T.T. 297-298, 300, 404-407, 408). The agents observed petitioner Lopez pass through a railroad yard, climb over a fence to the pier area, run along the water's edge and disappear behind the bow of the *Buenaventura.*

Lopez reemerged carrying a blue plastic bag over his shoulders. He retraced his steps from the pier area through the railroad yard to an adjacent city street where he entered a red Karman Ghia which also contained petitioners Tobar and Colon. The car sped off chased by two of the federal agents. In negotiating a turn, the Karman Ghia crashed into a parked car. On impact the windshield broke and a blue plastic bag was observed to fly through the broken window and land some 10 feet in front of the Karman Ghia. At the time of the collision, petitioners Lopez and Tobar ran from the car but were caught and arrested by the federal agents. Petitioner Colon who remained behind the wheel of the car was also arrested. An examination of the blue plastic bag revealed that it contained approximately 5 kilograms of cocaine.

Petitioners at trial denied having been at the Brooklyn pier and denied possessing any package (T.T. 494-588).

The trial court in charging the jury on the crime of direct importation of cocaine (Count One) instructed the jury that there were four elements the Government had to prove beyond a reasonable doubt:

> "First, that the defendants imported a narcotic drug into the U.S. . . .

> Second, the Government must establish that if a defendent took the bag away from the dock area, that he himself acted knowingly when he took the bag off the dock or ship. . . .
>
> Third, the Government must prove, assuming a defendant took the bag away from the dock, that he knew that the bag contained cocaine. A defendant must know that the object was being illegally imported . . .
>
> Now the fourth element is this: The importation must actually be contrary to law .... (T.T. 795-800)

The trial court under this count did not charge the inference from possession permitted by 21 U.S.C. § 174. The Court instructed the jury as an aid in determining the first element that they could utilize statistics, judicial notice by the court, taken from *Turner* v. *United States,* 396 U.S. 398, 418-419 and footnotes therein and from *United States* v. *Gonzales,* F.2d , docket nos. 3318, 33624, 33625, decided September 16, 1970, Second Circuit decision slip pp. 4323-4324 (T.T. 379, 383, 795-796). Utilizing there judicially noticed statistics the jury was to acquit all defendants on both counts if they found the cocaine was manufactured in the United States (T.T. 796). As a further aid in their deliberation of the first element the court instructed the jury as follows:

> "So you have to consider under this first element whether the defendants in any manner imported, brought or caused the bag containing cocaine to be introduced into the U.S.
>
> If you find that one of the defendants took the bag from the ship, or if it had been on the dock only a short time after being unloaded from the ship,

when it was picked up, then you may find that it was imported or introduced into the U.S. by the defendant and others aiding and abetting him.

If by contrast you should find that the bag had been brought on to the dock from land, not the ship, or if it had been sitting on the dock for a substantial length of time, after being unloaded from the ship by someone other than one of the defendants, then you should find none of the defendants imported or caused it to be introduced into the U.S." (T.T. 796-797)

The jury acquitted petitioners of the charge of importation of the cocaine (Count One).

In charging the jury under Count Two, the receiving, concealing and facilitating count, the court referred back to its charge on the first element of the Count One, and instructed the jury that there were four elements under this count:

"First, the Government must prove that the defendants concealed or in any manner facilitated the transportation or concealment of this cocaine. . . .

Second, the defendant must knowingly have concealed or facilitated transportation and concealment. . . .

Third, the Government must prove that the defendants knew the bag contained cocaine. It must also prove that they knew that the cocaine was illegally imported and knowledge may be inferred from the defendant's *possession,* if any, the conduct, if any, and all other facts and circumstances in the case.

Fourth, the narcotics substance must have been imported contrary to law. . . ." (T.T. 801-802) (emphasis supplied)

The jury convicted petitioners of the crime of receiving, concealing and facilitating the transportation of the cocaine alleged in Count Two.

The Court of Appeals upheld the convictions of petitioners under Count Two, citing its recent *en banc* decision in *United States* v. *Gonzalez,* F.2 , docket nos. 33618, 33624, 33625, decided May 14, 1971 decision slip pp. 4771, 4778-4779 which upheld the use of cocaine statistics judicially noticed without an adversary hearing. The court further held that the trial court's charge that an inference from possession of cocaine to establish knowledge and the illegality of the importation of cocaine, based on the use of the statistics was proper. (App. A. p. 16 *infra*).

ARGUMENT

In a criminal narcotic case, involving a large amount of cocaine, an adversarial hearing is required in the trial court as specified in *Turner v. United States*, 396 U.S. 398 (1970), to test the validity of judicially noticed statistics used as evidence to support the inferences from possession of the origin of the cocaine and of guilty knowledge of illegal importation.

The opinion of the court below, and its reliance on its prior recent decision in *United States* v. *Gonzalez*, F.2d , decided May 14, 1971, Docket Nos. 33618, 33624, 33625, decision slip pp. 4771-4784, is in conflict with the decision of this court in *Turner* v. *United States*, 396 U.S. 398 (1970) and with decisions within its own circuit, *United States* v. *Vasquez*, 429 F.2d 615 (2d Cir. 1970), *United States* v. *Puco*, 436 F.2d 761 (2d Cir. 1971), holding that an adversary hearing is necessary to determine the validity of presumptions from possession where large amounts of cocaine are involved and that judicially noticed statistics which has not been subjected to the adversarial process is not proper and sufficient evidence. See also *United States* v. *Liguori*, 438 F.2d 663 (2d Cir. 1971).

In *Turner* v. *United States*, 396 U.S. 398, 419 n. 39, (1970) this Court made it quite clear that the validity of government cocaine statistics, where large amounts of cocaine are involved, which would warrant the presumptions that the cocaine a defendant possessed came from abroad or that a defendant must have known that it did, was left to a time when the facts involving the statistics had been presented in an adversary context in the district courts. See also *Leary* v. *United States*, 395 U.S. 6, 36, 37 (1969).

The Court of Appeals for the Second Circuit followed this Court's rationale in its decision in *United States* v. *Vasquez*, 429 F.2d 615, 619 n. 4 (1970). *Vasquez* was a cocaine case involving similar issues of statistics and presumptions in which the court remanded the case back to the district court for an adversary hearing on the rationality of the presumptions based on the statistics.

On May 14, 1971, a majority of six judges of the Second Circuit in an *en banc* decision in *United States* v. *Gonzalez*, F.2d , Docket Nos. 33618, 33624, 33625, held that this Court's decision in *Turner* as to the necessity for an adversary hearing where large amounts of cocaine was involved, was merely a " ' hope' that should the issue of the presumptions' rationality be raised on appeal, a full record would be available on the issue", and that it did not "interpret the Supreme Court's language to prevent appellate considerations of the issue upon facts adversarily presented to juries prior to *Turner.*" The court further held (decision slip p. 4777 and note 4) that *Turner* permitted appellate courts to take judicial notice where adequate information was available. Its support for this contention was based on the fact that in *Turner* there were no statistics offered at the trial level but only in the Supreme Court by appellate briefs or judicial notice. Therefore the court reasoned it had the right to judicially notice statistics without an adversary hearing where such statistics were noticed at the trial level without a hearing even though this court refused to do just that in *Turner*. In essence the decision of the Second Circuit in *Gonzalez* is in direct conflict and contrary to the position of this Court in *Turner*.

In the instant case, the trial court judicially noticed statistics taken from this Court's opinion in *Turner*, 396 U.S.

at 418-419 and footnotes, and from the first decision of the Second Circuit in *United States* v. *Gonzalez*, F.2d , decided September 16, 1970, decision slip pp. 4323-4324.

The trial court instructed the jury that it could use these judicially noticed statistics to determine whether the cocaine was a domestic variety or a foreign import. If they found it was a foreign import, they could also use these statistics to determine whether petitioners knew the cocaine was illegally imported. The jury acquitted petitioners of importing the cocaine (Count One) but found them guilty of receiving, concealing and facilitating the transportation of the cocaine under Count Two.

Significantly in its charge to the jury under Count Two the trial court instructed the jury that they could infer petitioners' knowledge that the cocaine was illegally imported from petitioners' possession of the cocaine, a factor which the trial court did not charge under Count One dealing with direct importation.

It is obvious that the jury was then able with the use of the judicially noticed statistics and the inference from possession to find under Count Two that the cocaine was illegally imported and that petitioners knew the cocaine was illegally imported. The trial court never instructed the jury that an inference from possession could be made because of the large quantity of cocaine involved. Such an instruction was espoused by the Second Circuit in *United States* v. *Vasquez*, 429 F.2d 615 (1970), and in its recent *en banc* decision in *United States* v. *Gonzalez, supra*, decision slip p. 4780, note 10, although it held the lack of such a charge in cases tried before *Turner* was harmless error. It did not so hold for cases tried subsequent to *Turner*.

The decision of the jury as to petitioners' guilt was based on two factors: the judicially noticed but judicially untested statistics, and the rationality of the inference of knowledge from possession based on the statistics.

Evidence, except as inferred from the statistics, as to the origin of the cocaine was completely lacking in this case; nor was there any evidence even assuming that petitioners' possessed the cocaine, that petitioners' knew the cocaine was probably imported. See Judge Kaufman's dissent in first *Gonzalez* decision, *supra,* decision slip pp. 4328-4331.

There was no subjection of the judicially noticed statistical "evidence" to an adversarial process to determine not only the reliability of the statistics but to determine the facts necessary to decide the rationality of the inferences from possession.

We believe that no defendant consonant with a fair trial and due process, should be denied the right to contest at the trial level the judicially noticed statistical "evidence" relied upon here and the right to elicit what might well be valuable statistical information in his favor.

We further believe that no jury can be adequately informed as to the foundations and reliability of statistical "evidence" unless an adversarial proceeding is held; nor should a jury be permitted to determine from second-hand hearsay information that a presumed fact of knowledge must follow "more likely than not . . . from the proved fact of possession unless an adversary hearing is held which establishes with substantial assurance that such is the case. See *Leary* v. *United States,* 395 U.S. 6, 36 (1969).

An adversarial proceeding to establish the rationality of inferences based on statistical "evidence" is further required to implement a defendant's right under the Sixth Amendment to the confrontation of witnesses to test the very foundations from which the statistics were spawned.

CONCLUSION

For the reasons stated above, petitioners were denied a fair trial and due process. The petition for the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 900, 901, 902—September Term, 1970.

(Argued May 12, 1971 Decided May 26, 1971.)

Docket Nos. 71-1160, 71-1161, 71-1162

UNITED STATES OF AMERICA,

Appellee,

—against—

HUMBERTO TOBAR, JUAN RAUL LOPEZ, and VINCENTE COLON,

Defendants-Appellants.

Before:

FRIENDLY, *Chief Judge,*
WATERMAN and HAYS, *Circuit Judges.*

Appeal from a judgment of the District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* convicting appellants, after a verdict, of receiving, concealing and facilitating the transportation of twelve pounds of illegally imported cocaine in violation of 2 U.S.C. §§173 and 174. Affirmed.

JEROME LEWIS, Esq., New York, New York, *for Appellant Lopez.*

JOSEPH A. SOLOVEI, Esq., Brooklyn, New York, *for Appellants Colon and Tobar.*

Appendix A—Opinion of the United States Court of Appeals

PETER R. SCHLAM, Assistant United States Attorney (Edward R. Neaher, United States Attorney for the Eastern District of New York, and David G. Trager, Assistant United States Attorney, of Counsel), *for Appellee.*

PER CURIAM:

The Government's version of the facts in this case was as follows: Pursuant to an informer's tip that the Colombian flag ship *Buenaventura* was carrying cocaine into the country, two narcotics agents and a customs agent were maintaining surveillance of the vessel, which was docked at a Brooklyn pier, during the early morning hours of May 27, 1970. They observed Lopez dart through an adjacent railroad yard, climb over a fence to the pier area, run along the water's edge, and then disappear behind the *Buenaventura's* bow. A few minutes later he reappeared with a blue plastic bag slung over his shoulder. He threw the bag over the fence which separated the pier area from the railroad yard, jumped over the fence, retrieved the bag, and ran toward a pick-up truck parked near the agents' observation post. One of the agents descended, so as to keep Lopez in continuous view. The latter ran toward a second fence, pushed the blue bag and himself under it, ran to a trailer under which he stooped, and then alternately ran and walked down Furman Street. As he got within 100 feet of a red Karman Ghia parked on an adjoining street, the car pulled onto Furman Street and

Lopez entered, joining two men—later identified as Tobar and Colon—who were already inside. The car sped off and the two other agents, who had meanwhile descended from their observation post, gave chase. Attempting a turn in the midst of the chase, the Karman Ghia crashed into a parked auto. Its windshield broke and the blue plastic bag was seen to fly out. Lopez ran in one direction and Tobar in another. The agents caught and arrested them as well as Colon, who had remained behind the wheel. The blue bag, found some 10 feet in front of the Karman Ghia, contained 14 packages of cocaine, aggregating 5 kilograms, 98.9% pure.

Defendants were indicted in the District Court for the Eastern District of New York, on two counts. The first was for importing the cocaine; the second for receiving, concealing and facilitating the transportation of imported cocaine, knowing the same to have been illegally imported. Appellants testified that they had been drinking at a bar from 10 P.M. until around 3 A.M. on the morning of the accident and had become intoxicated; that Colon lost control of the car while driving home; and that they were all in the car when arrested. They denied having been at the Brooklyn pier and claimed not to have possessed a package of any color. The jury acquitted on the first count and convicted on the second.

Judge Weinstein did not charge the inference permitted by 21 U.S.C. §174 as such, although, in view of the quantity of cocaine he properly could have. In his instructions on the first count he told the jury that if they found that one of the defendants took the cocaine from the ship or that it

had been on the dock only a short time after being unloaded from the ship, they could conclude it had been imported by that defendant and that the other two had aided or abetted the importation; *per contra* if they found the cocaine had been brought to the dock from the land or had been sitting on the dock for a substantial time after being unloaded by someone else. He also instructed appropriately with respect to knowledge. When he came to the second count, after referring back to his charge on the first, he told the jury "the Government must prove that the defendants knew that the bag contained cocaine. It must also prove that they knew that the cocaine was illegally imported and knowledge may be inferred from the defendant's possession, if any, the conduct, if any and all the other facts and circumstances in the case."

Complaints are made of this charge and also of the fact that, after allowing defense counsel to read to the jury the statistics about stolen cocaine in *Turner* v. *United States*, 396 U.S. 398, 418-19, notes 36 and 37 (1970), the judge read some figures for more recent years which this court has recently cited in *United States* v. *Gonzalez*, F.2d , , notes 6-8 (1971), slip opinions 4771, 4778-79. As applied to this case, the arguments border on the frivolous. If the agents were telling the truth, it would be utterly absurd to suppose that anyone who had stolen so large an amount of cocaine[1] from legitimate domestic production would choose to transfer it at an early morning hour on

[1] The quantity here, five times the amount in *Gonzalez*, was over 75% of total thefts of domestically produced cocaine in 1969. See *United States* v. *Gonzalez*, *supra*, n. 6.

a Brooklyn pier in the shadow of a Colombian ship. Nothing in the law requires jurors to leave their common sense behind when they enter the jury room.

The contention of insufficiency of the evidence with respect to Colon and Tobar requires little comment. There again the only real issue was credibility. It would defy belief that a car should be parked at 3 A.M., conveniently near the place where Lopez exited with his blue bag containing 5 kilograms of cocaine, should pick him up, and dash off at a high rate of speed, and that then, on crashing, Tobar and Lopez should both flee, unless Tobar and Colon were part of Lopez' considerable criminal enterprise. Appellants' other claim, that the judge made a slight and in our view harmless error in misreading the second count of the indictment, is even more trivial.

Judgment affirmed.

APPENDIX B

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of May one thousand nine hundred and seventy-one.

Present:

HON. HENRY J. FRIENDLY,

Chief Judge,

HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

HUMBERTO TORAR, JUAN RAUL LOPEZ AND VINCENTE COLON,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

Appendix B—Judgment of Affirmance of the United States Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

/s/ A. DANIEL FUSARO
Clerk